In the United States Court of Appeals for the Ninth Circuit

No. 20760

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WAYNE JOHNSON, An Individual, d/b/a CARMICHAEL FLOOR COVERING CO.

and

JOHN DUNCAN, An Individual, d/b/a DUNCAN FLOOR CO., RESPONDENTS

On Petition for Enforcement of an Order of the National Labor Relations Board

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the United States Court of Appeals
for the Ninth Circuit

No. 20,760

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WAYNE JOHNSON, An Individual, d/b/a
CARMICHAEL FLOOR COVERING CO.

and

JOHN DUNCAN, An Individual, d/b/a
DUNCAN FLOOR CO., RESPONDENTS

On Petition for Enforcement of an Order of the National Labor Relations Board

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

I.

Respondents contend, relying solely on *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263, that their conduct could not have constituted unfair labor practices since, by contracting out their instal-

lation work, they ceased to be employers subject to the Act (Resp. Br. 3-6). This contention is without merit. Unlike *Darlington*, where the plant in question was permanently closed and plant operations were completely abandoned, both respondents in the present case continued as business entities. Both respondents continued selling floor covering materials and merely contracted out their installation work. The record does not show how many salesmen, office personnel, or other employees remained on respondents' payrolls. It does show, however, that Duncan continued to employ a bookkeeper and office manager (Tr. 95.) Duncan continued to make bids and contracts for a total price, including the cost of both material and installation (Tr. 67, 112-113). Johnson was interested in having his installing contractors use employees with whom Johnson was familiar and also cosigned a note to enable one of his contractors to purchase equipment (Tr. 161-162).

Neither does the *Darlington* case support respondents' assertion of "an absolute right to bring about a partial termination of business in any field in which they had previously been occupied . . ." (Resp. Br. 5-6). In *Darlington*, *supra*, at p. 268, the Supreme Court stated:

> We hold that so far as the Labor Relations Act is concerned, an employer has the absolute right to terminate his *entire* business for any reason he pleases, but disagree with the Court of Appeals that such right includes the ability to close *part* of a business no matter what the reason. [Emphasis supplied.]

Moreover, the Court specifically distinguished and approved those cases where (as here) part of a business is closed "but the work is continued by independent contractors." 380 U.S. 272-273, n. 16.

While the statute does not state the specific characteristics of an "employer," it does state that the term "employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice" (Sec. 2(3)). Accordingly, respondents' terminated installation workers remained employees within the statutory definition and their statutory employment relationship *vis-a-vis* respondents did not cease.[1]

II.

Respondents' contention that the collective bargaining agreement did not forbid them to contract out installation work urges an irrelevancy. The Board found that respondents committed unfair labor practices by refusing to be bound by the agreement and by unilaterally contracting out work without bargaining with the Union. Whether or not respondents' conduct violated the collective bargaining agreement was not an issue before the Board. There may have been a dispute, as respondents contend, over the ap-

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[1] See *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 190-192; *Bon Hennings Logging, Co.* v. *N.L.R.B.*, 308 F. 2d 548, 555-558 (C.A. 9); *N.L.R.B.* v. *Hunter Engineering Co.*, 215 F. 2d 916, 921 (C.A. 8); *Old King Cole, Inc.* v. *N.L.R.B.*, 260 F. 2d 530, 531-532 (C.A. 6).

plicability of the agreement's provisions against contracting out. Respondents, however, refused to be bound at all by the collective bargaining agreement, which included procedures for the settlement of disputes (G.C. Ex. 17, p. 9). Thus, it was respondents' repudiation of the agreement reached through collective bargaining and their circumvention of the collective bargaining process, not their violation of the terms of the agreement, which constituted respondents' unlawful refusals to bargain.

III.

The Board's rules for withdrawal from multi-employer bargaining, discussed at pp. 10-16 of our main brief, were recently approved again by the Second Circuit in *Publishers' Association* v. *N.L.R.B.*, decided July 25, 1966, 62 LRRM 2722.

CONCLUSION

For the reasons stated here and in our main brief, we respectfully submit that a decree should issue enforcing the Board's order in full.

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CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

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No. 20,761

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 1281, AFL-CIO, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

Cases—Continued Page

Cases—Continued

Statute:

Statute—Continued

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No. 20,761

NATIONAL LABOR RELATIONS BOARD, PETITIONER

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UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 1281, AFL-CIO, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order issued against the respondent on May 17, 1965, pursuant to Section 10(c) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.).[1] The Board's Decision and

[1] The pertinent statutory provisions are reprinted, *infra*, pp. 28-30.

Order (R. 30-40)[2] are reported at 152 NLRB No. 48. This Court has jurisdiction of the proceeding under Section 10(e) of the Act, the unfair labor practices having occurred at Anchorage, Alaska, within this judicial circuit. No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly stated, respondent (hereinafter "the Union") and Raber-Kief, Inc. (hereinafter "Raber-Kief" or "the Company") had an agreement pursuant to which the Company hired carpenters exclusively through the Union's hiring hall. The Board found that, by refusing to refer Ivan DiBoff for employment with the Company because of DiBoff's protected activities, the Union attempted to cause, and did cause the Company to discriminate against DiBoff in violation of Section 8(a)(3), and the Union thereby violated Section 8(b)(2) of the Act. The Board also found that, by this conduct, the Union had restrained and coerced DiBoff and the employees of the Company in the exercise of rights guaranteed by Section 7, and had thereby violated Section 8(b)(1)(A) of the Act. The facts upon which the Board's findings rest are summarized below.

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[2] References to the pleadings reproduced as "Volume I, Pleadings" are designated "R." References to the stenographic transcript of the hearing reproduced pursuant to Court Rule 10 are designated "Tr." References to the General Counsel's exhibits are designated "G.C. Exh." Wherever a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

A. *The exclusive hiring hall agreement*

The Union (as a member of the Alaska State Council of Carpenters) and the Company (as a member of the Alaska Chapter, Associated General Contractors of America) were parties to a collective bargaining agreement in effect at all times material here (G.C. Exhs. 2(a) and 2(b)). The agreement contained an exclusive hiring hall clause [3] which provided for the referral of qualified carpenters from two lists. List No. 1 consisted of men who either had been residents of the Union's jurisdictional area for the preceding year or had worked within the Union's jurisdictional area in each of the preceding 2 years (R. 31; G.C. Exh. 2(a), p. 5, Tr. 12-15). List No. 2 consisted of all other qualified applicants (R. 31; G.C. Exh. 2(a), p. 5). The agreement (R. 31; G.C. Exh. 2(a), Article III, Section 3(c), p. 4) gives a job preference to carpenters on List No. 1 except that an employer

> . . . may employ one carpenter out of each eight carpenters without regard to the said preference. Of the first eight carpenters employed on each job one may be the exception, thereafter the exception shall be only after seven other carpenters are employed. This ratio of List No. 1 to List No. 2 Carpenters will not be exceeded at any stage or period of [a] project.[4]

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[3] The term "non-exclusive" in Art. III, Sec. 3(a) of the agreement (G.C. Exh. 2(a), p. 3) is a typographical error. It should be read "exclusive" and is uniformly so understood by all affected parties (R. 31; Tr. 11, 12, G.C. Exh. 15, p. 1).

[4] The validity of these provisions is not at issue here.

When an employer makes an "open request" for carpenters (i.e., a general request for carpenters not specified by name), carpenters are referred in the order of the placement of their names on the two "out-of-work" lists. List No. 2 carpenters are not referred until all names on List No. 1 have been exhausted (R. 31; Tr. 22, 283). When an employer specifically requests a List No. 1 carpenter by name, that carpenter is entitled to immediate referral regardless of his placement on the "out-of-work" list. An employer's request for a specific List No. 2 carpenter is likewise honored, unless the one-to-seven ratio precludes such referral (R. 31; Tr. 16, 26-27, 284).

A request by an employer for a particular carpenter can be made either by a direct communication from the employer to the Union or through the employee involved. If a carpenter comes into the hall and states that he was sent by a specific employer to pick up a referral slip to go to work for that employer, such a request is treated by the Union as a specific request by that employer for that carpenter by name (R. 31; Tr. 25-26).

During the period from May to September 1963, Raber-Kief with its joint venturers [5] was engaged in

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[5] The Union, on the trial of this case, raised the issue of whether Raber-Kief or another of its joint venturers was the actual employer at the Monta-Vista Project, since the complaint related only to the Union's refusal to refer DiBoff for employment with Raber-Kief (Tr. 169-180, R. 5-6). However, the Union conceded that it had always dealt with Raber-Kief as the employer at Monta-Vista (Tr. 262, G.C. Exh. 15, p. 3); the issue was not raised before the Board;

the construction of the Monta-Vista Housing Project (hereinafter "the Monta-Vista Project" or "Monta-Vista") in Anchorage, Alaska (R. 31; Tr. 262).[6] Beginning in July 1963, Raber-Kief with its joint venturers was engaged in construction, pursuant to a contract with the United States Navy, on Adak Island in the Aleutian Islands (hereinafter "the Adak Project" or "Adak") (R. 33; Tr. 58, 290-291).[7] The Company hired all of its carpenters at both projects through the Union's hiring hall (Tr. 279).

B. ***The Union's discriminatory refusal to refer Ivan DiBoff for employment with Raber-Kief at both Monta-Vista and Adak***

Ivan DiBoff, a carpenter by trade, is a member of the Union and has worked in its jurisdictional area for many years (R. 31; Tr. 70-71, 266). In November 1961, DiBoff left Alaska for Hawaii to work on one specific project and did not return to Alaska until May 1963 (R. 31; Tr. 267-270).[8] Upon his return,

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and the Board, in agreement with the Trial Examiner, found that Raber-Kief was the actual employer at Monta-Vista (R. 31-32).

[6] At various times during the trial, this project was also referred to as the "Mountain View Project."

[7] The record is unclear whether the joint venturers on the Adak Project were the same as those on the Monta-Vista Project. However, the Union did not raise the issue of Raber-Kief's status as employer on the Adak Project (see n. 5, *supra*, R. 8, G.C. Exh. 15, p. 3) and the Board, in agreement with the Trial Examiner, found that Raber-Kief was the actual employer at Adak (R. 33).

[8] Unless otherwise indicated, all dates refer to 1963.

DiBoff registered with the Union and was placed on List No. 1 (R. 31; Tr. 47, 184-186). When the matter came to the attention of Union Business Agent Robert Powell, Powell removed DiBoff's name from List No. 1 and placed it at the bottom of List No. 2, since DiBoff was not a resident of Alaska and had not worked in the Union's jurisdictional area in both of the preceding 2 years (R. 31; Tr. 47-48).[9]

In early June, DiBoff asked George Woodward, the Company's foreman at Monta-Vista, for a job. Woodard told DiBoff that he could start to work as soon as he got a referral from the Union (R. 31-32; Tr. 74, 112-113).[10] DiBoff then went to the Union hall and told Powell that he had a job waiting for him

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[9] Originally the Union's financial secretary had determined that DiBoff should be placed on List No. 1 since (1) he had worked continuously in the State of Alaska since the late 1920's or early 1930's; (2) he had only temporarily left Alaska and intended to return; (3) he did not establish an official residence in Hawaii; and (4) he had in fact returned to Alaska to work (Tr. 184-186). On the other hand, Powell asserted that DiBoff was a resident of the State of Washington (where he owned a home occupied by his wife) and placed his name on List No. 2 (Tr. 47-48). It was not contended before the Board that either Powell's removal of DiBoff's name from List No. 1 or Powell's placement of DiBoff's name at the bottom of List No. 2 (possibly below the names of other carpenters who had signed up after the time that DiBoff originally signed on List No. 1) was motivated by improper considerations.

[10] DiBoff's immediate employment was not contemplated at that time because DiBoff preferred to await the arrival of his tools, which were then being shipped to Alaska, and Woodward had no urgent need for him at that time. However, Woodward told DiBoff that he could start work as soon as his tools arrived (Tr. 112-113).

with the Company if he could get a referral (R. 32; Tr. 76-77). Powell refused to give him a referral on the ground that DiBoff was a List No. 2 man (R. 32; Tr. 76). After subsequent frequent visits to the hiring hall proved equally fruitless, DiBoff reported to Woodward that he was unable to get a referral (R. 32; Tr. 113).

On or about June 23, Woodward made a telephone request to the Union for the referral of DiBoff, Narvald Osnes, and Torstein Nicolaysen, which request was denied on the ground that all three of them were on List No. 2 (R. 32; Tr. 114).[11] Woodward then took the three men to the Union hall, where Powell asserted that he could not dispatch List No. 2 men because the ratio of List No. 1 men to List No. 2 men on the Monta-Vista Project would not permit it (R. 32; Tr. 114). Urgently needing carpenters, Woodward then made an "open request" (R. 32; Tr. 115). Pursuant to this request, Powell, between June 24 and June 30, referred eight or nine carpenters to Woodward, including one List No. 2 carpenter, Ashjarn Saelvik (R. 32; G.C. Exhs. 6 and 7, p. 3).[12]

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[11] So far as the record shows, this was the first direct communication from the Company to the Union requesting DiBoff's referral. Woodward in early June asked Link Morse, then the Company's superintendent at Monta-Vista, to specifically request DiBoff's referral. However, there is no evidence that Morse ever made such a request (R. 31-32; Tr. 113).

[12] Aldrich, Qualls, Sherrin, McDonald, Cloe, Saelvik, Alexander, Green, and Pendergrass (G.C. Exh. 6, pp. 20-22). G.C. Exh. 6 is the payroll record for carpenters employed at Monta-Vista during the relevant period. It is composed

Some of these carpenters, including Saelvik,[13] proved to be incompetent and were laid off on June 28 (R. 32; G.C. Exh. 6, p. 22, Tr. 115). When Saelvik was referred to the Company on June 26, the Monta-Vista quota of List No. 2 men had already been filled (R. 32; G.C. Exhs. 6 and 7).[14]

About July 1, Powell asked Woodward to hire a List No. 1 carpenter, Abe Hansen, who Woodward did not think was the right man for the job (R. 32; Tr. 115-116). Powell said that if Woodward would put Hansen to work, he would refer either Osnes or Nicolaysen, both No. 2 men whom Woodward had unsuccessfully requested the week before (R. 32; Tr. 116-117). Woodward refused but said he would put Hansen to work if Powell referred both Osnes and Nicolaysen (R. 32; Tr. 117). This in fact was done.

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of 30 pages consecutively numbered 1-30 in red in the lower right hand corner of each page. The pages are not in chronological order.

[13] The Board concluded that Saelvik had not been specifically requested and was terminated for incompetency (R. 32), in view of Woodward's testimony that some of the carpenters referred pursuant to his "open request" had to be laid off for incompetency (Tr. 115); Saelvik's termination after 2 days, although carpenters were then needed and being hired; the fact that only one other carpenter was laid off during this period (G.C. Exh. 6, pp. 20-22), and the fact that Woodward made his specific requests on the basis of others' recommendations (R. 33-34; Tr. 111). See *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 800.

[14] On June 26, there were 20 carpenters employed at Monta-Vista (G.C. Exh. 6, pp. 20-22). Four of them (Harrington, Jacob Morken, Wood, and Saelvik) were List No. 2 men (G.C. Exh. 7, p. 3). The Company, at that time, was entitled to only three List No. 2 men.

On July 2, Powell referred Osnes when the Monta-Vista quota of No. 2 men was already filled (R. 32; G.C. Exhs. 6 and 7, Tr. 117).[15] On July 3, when Powell referred Hansen and Nicolaysen, the number of List No. 2 carpenters on that project was two in excess of the permissible quota [16] (R. 32; G.C. Exhs. 6 and 7, Tr. 118). A day or two after Hansen and Nicolaysen were referred, Powell told Woodward that he was over his limit of List No. 2 men, but that if Woodward would agree to keep the men he already had, there would be no problems (Tr. 118-119).

In the latter part of July, Raber-Kief began hiring carpenters for the Adak Project (R. 33; Tr. 291). On Woodward's recommendation, the Company's Office Manager, Louis Taylor, placed a request for DiBoff which was denied by Powell on the ground that DiBoff was not on List No. 1 (R. 33; Tr. 290-291).[17] In an attempt to secure referral, DiBoff made

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[15] On June 2, there were 22 carpenters employed at Monta-Vista (G.C. Exh. 6, pp. 23-25). Four of them (Harrington, Jacob Morken, Wood, and Osnes) were List No. 2 men (G.C. Exh. 7, p. 3). The Company, at that time, was entitled to only three List No. 2 men.

[16] On July 3, there were 24 carpenters employed at Monta-Vista (G.C. Exh. 6, pp. 23-25). Five of them (Harrington, Jacob Morken, Wood, Osnes, and Nicolaysen) were on List No. 2 (G.C. Exh. 7, p. 3). The Company, at that time, was entitled to only three List No. 2 men.

[17] The Adak and Monta-Vista Projects were entirely separate for hiring purposes, and each was required to adhere to its own one-to-seven ratio (Tr. 24-25). However, the Monta-Vista Project was a "proving ground" for carpenters later transferred to Adak (Tr. 24). Thus, Woodward recommended to Taylor certain carpenters for hire at Adak.

frequent visits to the Union hall, which visits produced no results until about September 10 (a week after the Union was served with the charge in this case), when DiBoff was referred to the Adak Project (R. 33; 3, Tr. 49-50, 186-187, G.C. Exh. 1(b)).[18] After DiBoff had been initially denied a referral to the Adak Project, three List No. 2 carpenters were referred to the project at times when Adak's quota of such carpenters had already been filled (R. 33; G.C. Exhs. 5(a), 5(b), 7 and 8).[19]

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[18] DiBoff was dispatched at the specific request of Lloyd Cleveland, the office manager in Anchorage for the Adak Project (Tr. 140). At the time of DiBoff's dispatch, the Adak quota of List No. 2 men had already been filled. On September 10, there were 26 carpenters at Adak (G.C. Exh. 5(a), pp. 31-33, G.C. Exh. 5(b)). Five of them (DiBoff, Wood, Wymer, Vosberg, and O'Shaughnessy) were on List No. 2 (G.C. Exh. 7, pp. 2-3, G.C. Exh. 9). Thus, since the Company was entitled to only four List No. 2 men, DiBoff's referral to Adak was itself in disregard of the ratio.

G.C. Exh. 5(a) and 5(b) are the payroll records for carpenters employed at Adak during the relevant period. G.C. Exh. 5(a) is composed of 43 pages, consecutively numbered 31-73 in red in the lower right hand corner of each page. G.C. Exh. 5(b) is composed of two unnumbered pages. The pages of neither exhibit are in chronological order.

[19] These were Wood, O'Shaughnessy, and Wymer. More specifically:

1. On July 30, there were eight carpenters at Adak (G.C. Exh. 5(a), pp. 64-66). Two of them (Wood and Vosberg) were on List No. 2 (G.C. Exh. 7, p. 3, G.C. Exh. 9). The Company, at that time, was entitled to only one List No. 2 man.

2. On August 13, there were 16 carpenters at Adak (G.C. Exh. 5(a), pp. 55-58). Three of them (O'Shaughnessy, Wood, and Vosberg) were List No. 2 men (G.C.

While Woodward did not specifically request DiBoff for work at Monta-Vista after June 23, his reason for not doing so was that he "was resigned to the fact that [DiBoff] was not going to be sent to the job," since DiBoff had told him "many times that he couldn't get" a referral slip (R. 33; Tr. 125). Taylor requested DiBoff for work at Adak in July, again in August,[20] and a couple of other times (R. 33-34; Tr. 290-292). After Taylor "had been definitely turned down and gave up hope of getting a dispatch" for DiBoff, he told DiBoff that "it was just a waste of my time and his time coming in to see me" (R. 34; Tr. 293). Taylor "told DiBoff if he could get Mr. Powell to call [Taylor] and dispatch [DiBoff], [Taylor] would send him to Adak" (Tr. 293). During this entire period, DiBoff appeared at the Union hall almost daily seeking a referral for employment with the Company (Tr. 49-50, 186-187) and Powell knew that the Company had a "continual request" for DiBoff's services (Tr. 186-187).

Exh. 7, pp. 2-3, G.C. Exh. 9), while the Company was entitled to only 2 List No. 2 men.

3. On August 20, there were 22 carpenters at Adak (G.C. Exh. 5(a), pp. 49-53). Four of them (Wymer, Wood, Vosberg, and O'Shaughnessy) were on List No. 2 (G.C. Exh. 7, pp. 2-3, G.C. Exh. 9), while the Company was entitled to only 3 men on List No. 2.

[20] Thus, Taylor called Business Agent Powell to request DiBoff immediately after Taylor received a letter from the Union's financial secretary that, pursuant to the August 12 decision of the Union's executive board, DiBoff would be dispatched (R. 33; Tr. 193, 291). The membership refused to ratify the board's action, and DiBoff was not dispatched (see pp. 15-16, *infra*).

During the entire period from early June to September 10, Powell refused every request by Woodward, Taylor, and DiBoff for a referral of DiBoff to Raber-Kief on the ground that DiBoff was on List No. 2 and the ratios at both Adak and Monta-Vista would not permit such a referral (R. 34; Tr. 76-77, 114, 292). Yet, after the initial requests for DiBoff's referral had been denied on that ground, eight or nine other List No. 2 carpenters were referred to the Company in disregard of the ratio and when the Company's quota of List No. 2 carpenters had already been exhausted (R. 34; G.C. Exhs. 5(a), 5(b), 6, 7, 9, Tr. 37).[21] Other List No. 2 carpenters were re-

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[21] These are as follows:

On the Adak Project, Wood, O'Shaughnessy, and Wymer (see n. 19, pp. 10-11, *supra*).

On the Monta-Vista Project, Saelvik (see n. 14, p. 8, *supra*), Osnes (see n. 15, p. 9, *supra*), Nicolaysen (see n. 16, p. 9, *supra*), Bert Harrington, Jacob Morken, and Donald Freeberg.

Bert Harrington was referred to Monta-Vista on June 13 in disregard of the ratio, as there were 12 carpenters on the job (G.C. Exh 6., pp. 14-16) of which 3 (Woodward, Wood, and Harrington) were on List No. 2 (Tr. 37, G.C. Exh. 7, p. 3) at a time when the Company was entitled to only 2 List No. 2 men.

Jacob Morken was referred to Monta-Vista on June 21 in disregard of the ratio, since there were 15 carpenters on the job (G.C. Exh. 6, pp. 17-19) of which 4 (Woodward, Wood, Harrington, and Jacob Morken) were List No. 2 men (Tr. 37, G.C. Exh. 7, p. 3) while the Company was entitled to only 2 List No. 2 men. It should be noted that Woodward's status as a List No. 2 man ceased on June 24 when he was promoted to the position of superintendent at Monta-Vista (Tr. 37, G.C. Exh. 6, pp. 17, 20).

Donald Freeberg was referred to Monta-Vista on

ferred to Monta-Vista pursuant to an "open request," although Raber-Kief's specific request for DiBoff's referral was still pending (R. 33-34; Tr. 283).[22] Moreover, when DiBoff was finally referred to the Adak Project in September, his referral was in disregard of the ratio (G.C. Exhs. 5(a) and 5(b)).[23]

C. *Business Agent Powell's hostility to Ivan DiBoff because of his protected activities*

The genesis of Powell's hostility to DiBoff was an incident which occurred on a construction project at

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August 20 (G.C. Exh. 6, p. 10). While Freeberg was not on either list, the Board inferred that he was a List No. 2 man (R. 35) because (1) Powell admitted that he did not know what Freeberg's status was, and although Powell could have checked his records, he failed to do so (R. 35; Tr. 37); and (2) Powell testified that at one point after the middle of July, he had exhausted the names on List No. 1 and had to refer List No. 2 men to Monta-Vista (Tr. 283) and Freeberg was the only man, not on List No. 1, hired at Monta-Vista after Nicolaysen was hired on July 3 (G.C. Exh. 6).

At the time of Freeberg's referral, the Monta-Vista quota of List No. 2 men was well over the one-to-seven ratio, since of the seven carpenters (not including Freeberg) employed (G.C. Exh. 6, p. 10), three of them (Osnes, Nicolaysen, and Jacob Morken) were on List No. 2 (G.C. Exh. 7, p. 3).

[22] Saelvik on June 26 (see n. 14, p. 8, *supra*) and Freeberg on August 20 (see n. 21, pp. 12-13, *supra*). The Board found that Freeberg was not specifically requested (R. 33-34) in view of Powell's testimony that when he exhausted List No. 1, he referred List No. 2 men to Monta-Vista (Tr. 283) and the absence of evidence that Freeberg was specifically requested.

[23] See n. 18, p. 10, *supra*.

St. Paul's Island in 1960 (R. 35; Tr. 56-57, 86-88).[24] DiBoff allegedly violated the Union's jurisdictional rules by having a laborer move some material (R. 35; Tr. 56, 87, 100, 194-195, 237). The job steward called a carpenters' meeting and the Union's members on the job voted that DiBoff be removed from his job. Only the project manager's refusal to remove DiBoff saved his job (R. 35; Tr. 87-88). When Powell later arrived at the island, he reprimanded DiBoff for "not standing up to the Carpenters' jurisdiction" (R. 35; Tr. 56, 195, 237).

In June of 1963, the Union held an election for a business agent and Powell was a candidate. Because of certain irregularities, a rerun election was held in August 1963 (R. 35; Tr. 57-58). In both elections, DiBoff openly, "very vigorously and severely" campaigned against Powell, telling everyone that Powell "was not man enough for the job"(R. 35; Tr. 58, 85, 199-200). DiBoff "pulled no punches" while campaigning and his part in the campaign was "common knowledge" of which Powell was "well aware" (R. 35; Tr. 199-200).

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[24] While this incident occurred approximately 3 years prior to the Union's refusal to refer DiBoff, DiBoff left for Hawaii immediately after the St. Paul Project was completed (Tr. 269-270) and did not return until May of 1963 (R. 31; Tr. 267). Significantly, Powell, during the summer of 1963, repeatedly raised this incident as a reason for his opposition to DiBoff, e.g., in his conversation with another employer's construction superintendent (Frank Skinner) in August 1963 (Tr. 99-100), and at the Union's general membership meeting on August 19, 1963 (Tr. 194-195, 237, 245-246).

When DiBoff was unable to get a referral to the jobs here involved, he contacted the International headquarters of the Union in July 1963 and made repeated complaints to the National Labor Relations Board in July and August (R. 35; 3, Tr. 78, G.C. Exh. 10, 11, 12, 13). DiBoff showed his correspondence with the International Union to other Union officials (Tr. 198-199, 244-245) and Powell knew that such correspondence had taken place (Tr. 84, 199). On one occasion around the end of July, Powell acknowledged receipt of a letter from the International Union, remarked to DiBoff: "You think this is going to help you?" (R. 35; Tr. 84, 86), and told DiBoff to "go to hell" (Tr. 84). Powell also learned, at least by August 12, that DiBoff had complained to the Board about his inability to get dispatched (R. 35; Tr. 244-245).

Finally, when DiBoff failed to get a referral to Raber-Kief, he took his case to the Union's executive board at a meeting held on August 12, shortly before the rerun election for the office of business agent (R. 36; Tr. 188, 244-245). Business Agent Powell, although not a member of the executive board, attended the meeting and spoke out against DiBoff (R. 36; Tr. 245-246). The executive board decided unanimously, in view of DiBoff's "union background and age," to reverse Powell's action, to grant DiBoff "special dispensation," [25] and to dispatch him to any

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[25] The use of the term "special dispensation" in the Executive Board's motion was to satisfy Powell. It was a matter of expediency to help Powell save face and to sell the idea to Powell more readily (Tr. 201-202). The motion was

job for which he was requested (R. 36; G.C. Exh. 14, Tr. 189). The next day the Union's financial secretary wrote a letter to Taylor of Raber-Kief advising that DiBoff would be dispatched at any time it was so desired (R. 36; Tr. 193-194, 291). Nothing came of this because the executive board's action was reversed at the August 19 general membership meeting of the Union (R. 36; Tr. 194, 245), at which Powell was very "vindictive" and spoke "violently" against DiBoff because of the St. Paul Island incident in 1960 (R. 36; Tr. 194-195, 237).

Powell admitted that DiBoff made him "temporarily angry" (R. 36; Tr. 55) and stated "I am not very happy with DiBoff because of the way he insulted me all summer and because of the lengths to which he went to get dispatched" (R. 36; G.C. Exh. 15, p. 3). Financial Secretary Lannen "pleaded" with Powell to dispatch DiBoff (R. 36; Tr. 196). Powell replied at one point that he "was not going to dispatch the old son-of-a-bitch, he was on List No. 2 regardless" (R. 36; Tr. 196). Powell demonstrated "great dislike" for DiBoff (R. 36; Tr. 197) and Lannen thought that Powell and DiBoff "would come to blows several times there" when DiBoff asked to be dispatched (R. 36; Tr. 197). To Frank Skinner, a supervisor for Wedekind Construction Company, who asked for DiBoff's referral to his project, Powell stated that he did not "give a damn if [DiBoff] ever goes to work" (R. 36; Tr. 98-100).

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made as an "appeaser" to accommodate everyone, to satisfy the desires of all present and yet to place DiBoff on the job (Tr. 252-253).

II. The Board's conclusions

The Board found that the Union's alleged reason for denying the requests for DiBoff's referral to Raber-Kief (i.e., that his referral was not warranted under the one-to-seven ratio governing the referral of List No. 2 carpenters) was "not borne out by the record" (R. 36). The Board also found that "far from strictly enforcing this rule, the Union frequently waived it with respect to other List No. 2 carpenters" (R. 36). The Board was "convinced that the real reason for the discriminatory treatment accorded to DiBoff is to be found in DiBoff's union activities which incurred Powell's enmity and disapproval" (R. 37). The Board then concluded "[a]s the Respondent attempted to cause, and did cause Raber-Kief, Inc., to discriminate against DiBoff in violation of Section 8(a)(3), the Respondent thereby violated Section 8(b)(2) of the Act. By thus attempting to cause and causing Raber-Kief to discriminate against DiBoff, the Respondent also has restrained and coerced DiBoff and the employees of Raber-Kief, Inc., in the exercise of rights guaranteed by Section 7 of the Act, and has thereby violated Section 8(b)(1)(A) of the Act" (R. 38).

III. The Board's order

The Board's order (R. 39-40) requires the Union to cease and desist from causing or attempting to cause the Company to deny employment to, or in any other manner to discriminate against, Ivan DiBoff in violation of Section 8(a)(3) of the Act, or from

denying a referral to, or in any other way discriminating against, Ivan DiBoff for engaging in activities as a Union member, or from in any like or related manner restraining or coercing the Company's employees in the exercise of their statutory rights. Affirmatively, the Union is required to notify the Company that it has no objection to the continued employment of DiBoff, to make DiBoff whole for loss of wages, and to post appropriate notices.[26]

SPECIFICATION OF POINT RELIED ON

Substantial evidence on the record considered as a whole supports the Board's finding that the Union refused to refer employee DiBoff to the Company because of his intraunion activities, in violation of Section 8(b)(2) and (1)(A) of the Act.

ARGUMENT

Substantial Evidence On The Record Considered As A Whole Supports The Board's Finding That The Union Refused To Refer DiBoff For Employment With Raber-Kief Because Of His Intraunion Activities, In Violation Of Section 8(b)(2) And (1)(A) Of The Act

A. *Introduction and controlling principles*

A union and an employer can, of course, lawfully agree to an exclusive hiring hall, requiring an applicant for employment to obtain union clearance as a condition to employment, provided that the hiring hall

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[26] The backpay period begins on the date of DiBoff's first request for referral to Raber-Kief's Monta-Vista Project, and terminates on the date of his referral to Raber-Kief's Adak Project (R. 39).

is operated on a non-discriminatory basis.[27] However, it is well established that a union violates Section 8(b)(2) and (1)(A) of the Act, where, in administering an exclusive hiring hall, it refuses to refer an employee for the purpose of punishing or retaliating against him for engaging in activity protected by Section 7 of the Act.[28] Section 7 protects the right of a union member to abstain from all union activities, including adherence to union rules;[29] his right to seek to alter the manner in which his union's

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[27] *Local 357, International Brotherhood of Teamsters* v. *N.L.R.B.*, 365 U.S. 667; *N.L.R.B.* v. *International Union of Operating Engineers Local 12*, 323 F. 2d 545 (C.A. 9); *N.L.R.B.* v. *Tom Joyce Floors, Inc.*, 353 F. 2d 768, 769-771 (C.A. 9).

[28] *Radio Officers Union* v. *N.L.R.B.*, 347 U.S. 17, 25-26, 40-42; *Lummus Co.* v. *N.L.R.B.*, 339 F. 2d 728, 733-735 (C.A. D.C.); *N.L.R.B.* v. *Local 490, International Hod Carriers*, 300 F. 2d 328, 332 (C.A. 8); *N.L.R.B.* v. *Local 138, Operating Engineers*, 254 F. 2d 958 (C.A. 2), enforcing *per curiam* 118 NLRB 669; *Local 138, Operating Engineers* v. *N.L.R.B.*, 321 F. 2d 130, 136-137 (C.A. 2); *N.L.R.B.* v. *International Longshoremen's and Warehousemen's Union*, 210 F. 2d 581 (C.A. 9); *N.L.R.B.* v. *International Union of Operating Engineers, Local 12*, 237 F. 2d 670, 674 (C.A. 9), cert. denied, 353 U.S. 910. See also, *N.L.R.B.* v. *Waterfront Employers*, 211 F. 2d 946 (C.A. 9); *N.L.R.B.* v. *Local 507, International Hod Carriers*, 336 F. 2d 460 (C.A. 9), enforcing *per curiam*, 140 NLRB 1090; and *N.L.R.B.* v. *Hod Carriers, Local 300*, 336 F. 2d 459 (C.A. 9), enforcing *per curiam*, 128 NLRB 971 and 134 NLRB 1768.

[29] *Radio Officers, supra*, 347 U.S. at 40, 42; *N.L.R.B.* v. *Reed*, 206 F. 2d 184, 189 (C.A. 9); *N.L.R.B.* v. *Local 490, International Hod Carriers*, 300 F. 2d 328, 332 (C.A. 8); *N.L.R.B.* v. *Local 65, Carpenters*, 318 F. 2d 419 (C.A. 3), enforcing *per curiam* 135 NLRB 574, 577.

affairs are administered (whether by expressing dissatisfaction with local union officials, protesting their policies to the International, seeking to compel a change in their methods of running the union, or seeking to effect their removal by election or otherwise);[30] and his right to complain to the National Labor Relations Board about his union's refusal to refer him.[31]

The Board found in the instant case that the "real reason" for Business Agent Powell's refusal to refer DiBoff for employment with the Company in the summer of 1963 was "DiBoff's union activities which incurred Powell's enmity and disapproval" (R. 37). Because the Union and the Company were admittedly parties to an agreement which required such referral as a condition of hire, the Board's conclusion and order are plainly proper if substantial evidence on the whole record supports the Board's finding of

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[30] *Lummus Co.* v. *N.L.R.B.*, 339 F. 2d 728, 733-734 (C.A. D.C.); *Brewers & Maltsters Local 6* v. *N.L.R.B.*, 301 F. 2d 216 (C.A. 8), enforcing 128 NLRB 294, 305; *N.L.R.B.* v. *Local 138, Operating Engineers*, 254 F. 2d 958 (C.A. 2), enforcing *per curiam*, 118 NLRB 669; *Local 138, Operating Engineers* v. *N.L.R.B.*, 321 F. 2d 130 (C.A. 2); *N.L.R.B.* v. *Bechtel Corp.*, 328 F. 2d 28 (C.A. 10); *Flack* v. *N.L.R.B.*, 327 F. 2d 396 (C.A. 7); *N.L.R.B.* v. *Machinists Local 504*, 203 F. 2d 173 (C.A. 9); *N.L.R.B.* v. *Aurora City Lines*, 299 F. 2d 229, 231-232 (C.A. 7); *N.L.R.B.* v. *Nu-Car Carriers*, 189 F. 2d 756, 760 (C.A. 3), cert. denied, 342 U.S. 919.

[31] *Local 138, Operating Engineers* v. *N.L.R.B.*, 321 F. 2d 130, 136 (C.A. 2); *Bordas & Co.* v. *N.L.R.B.*, 288 F. 2d 132 (C.A. D.C.), enforcing *per curiam*, 125 NLRB 1335; see also, *N.L.R.B.* v. *Operating Engineers Local 12*, 237 F. 2d 670, 674 (C.A. 9), cert. denied, 353 U.S. 910.

Powell's improper motivation in refusing to refer DiBoff. The record evidence amply warrants this finding.[32]

B. ***Substantial evidence on the whole record supports the Board's finding that Union Business Agent Powell refused to refer DiBoff to the Company because of DiBoff's protected activities***

The evidence summarized in the Statement establishes that, pursuant to an exclusive hiring hall contract, the Company refused to hire any carpenters, including DiBoff, unless they first received clearance from the Union (p. 5, *supra*). Between June 30 and September 10, 1963, through its supervisors Woodward and Taylor, the Company made direct requests to the Union for the referral of Ivan DiBoff to the Monta-Vista and Adak Projects (pp. 6-7, 9-11, *supra*). Both continued unsuccessfully to request DiBoff until they became convinced that further requests would have been futile (p. 11, *supra*).

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[32] In finding that the Union violated the Act, the Board rejected the Trial Examiner's recommendation that the complaint be dismissed. Since the Board accepted the Trial Examiner's findings on basic facts and since the Board's disagreement with the Trial Examiner involves inferences and questions of law rather than credibility determinations, the Trial Examiner's conclusions are not entitled to special weight. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 494, 496; *Cheney California Lumber Co.* v. *N.L.R.B.*, 319 F. 2d 375, 377 (C.A. 9); *N.L.R.B.* v. *Texas Independent Oil Co.*, 232 F. 2d 447, 451 (C.A. 9); *Warehousemen and Mail Order Employees Local 743* v. *N.L.R.B.*, 302 F. 2d 865, 866, 869 (C.A.D.C.); *Webb Fuel Co.* v. *N.L.R.B.*, 308 F. 2d 936, 937-938 (C.A. 6); *International Woodworkers of America* v. *N.L.R.B.*, 262 F. 2d 233, 234 (C.A.D.C.).

Moreover, beginning in early June and continuing to September, DiBoff appeared at the Union hall almost daily, informing Business Agent Powell that he had a job waiting for him with the Company and requesting a referral (p. 11, *supra*). Notwithstanding the Union's practice of treating such a request as a direct request from the employer for that specific carpenter by name, Powell refused to give DiBoff a referral slip, while at the same time referring to the Company other carpenters who, like DiBoff, were on List No. 2 (pp. 4, 12-13, *supra*).

The Board was well warranted in concluding that Powell refused to give DiBoff a referral slip to retaliate against his protected activities. Powell's refusal to refer DiBoff began immediately after DiBoff's return from Hawaii, where DiBoff had gone immediately after incurring Powell's resentment at his failure, as a member, to observe the Union's work-jurisdiction rules—activity protected by Section 7 of the Act (pp. 13-14, *supra*). After Powell had placed DiBoff on List No. 2, he and DiBoff engaged in many heated arguments, which almost "came to blows," about Powell's refusal to dispatch DiBoff (p. 16, *supra*). DiBoff openly campaigned against Powell's reelection before both union elections in the summer of 1963 (p. 14, *supra*). DiBoff took his fight with Powell to the Union executive board shortly before the second union election in an effort to discredit Powell and to get a referral to the Company (pp. 15-16, *supra*). DiBoff went to the extreme—in Powell's view—of registering his complaint against Powell with

the International Union President and with the National Labor Relations Board (p. 15, *supra*). Throughout this entire period, Powell steadfastly refused to refer DiBoff for employment (p. 12, *supra*). He fought DiBoff's attempts to get a referral before the Union executive board, before the general membership meeting of the Union, and finally before the President of the International Union, who had investigated DiBoff's complaint (pp. 15-16, *supra*). Not until after the Union had been served with the charges in this case did Powell recant and grant a referral to DiBoff (pp. 9-10, *supra*).

Powell himself summed up his hostility toward DiBoff by stating: "I am not very happy with DiBoff because of the way he insulted me all summer and because of the lengths to which he went to get dispatched" (p. 16, *supra*). As we have shown, such "lengths" involved DiBoff's exercise of his rights under the Act. The inference of unlawful motivation warranted by the evidence summarized above is, moreover, strengthened by the fact that the reasons advanced by the Union for Powell's refusal to refer DiBoff fail to stand under scrutiny (*N.L.R.B.* v. *Dant*, 207 F. 2d 165, 167 (C.A. 9)).

The Union contended that it failed to refer DiBoff because, after the Company's initial requests for DiBoff's services, the Company's failure to make continual requests indicated a preference for other List No. 2 men. However, Company supervisors Woodward and Taylor testified that they eventually stopped asking Powell to refer DiBoff because they "gave up hope" and were "resigned to the fact" that DiBoff

was not going to be referred (p. 11, *supra*).[33] The Board properly concluded that the Company's failure to make the futile gesture of further repeated requests for DiBoff does not warrant the inference that the Company intended to cancel or revoke its prior requests for DiBoff (R. 34).[34] Nor could the Union have inferred any such intention, in view of DiBoff's continued requests for referral to the Company—requests which under the Union's ordinary practice were the equivalent of requests emanating from the Company (pp. 4, 11, *supra*). Moreover, two of the nine List No. 2 men referred while DiBoff was unsuccessfully seeking referral were not specifically requested by the Company,[35] whereas DiBoff had been so requested—hardly evidence that the Company had evinced a preference for them over DiBoff. Furthermore, Woodward testified—and his testimony in this respect was credited by the Trial Examiner (R. 23)—that as between DiBoff and two other List No. 2 men referred during this period,[36] he "did not prefer any one of the three over the others" (Tr. 126-127). Finally, far from showing a Company preference for

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[33] The Trial Examiner, who accepted the Union's contention that the Company had revoked its request for DiBoff, did not mention this testimony (R. 33-34).

[34] Cf. *N.L.R.B.* v. *Machinists Local 504*, 203 F. 2d 173, 176 (C.A. 9); *N.L.R.B.* v. *Swinerton*, 202 F. 2d 511, 515 (C.A. 9), cert. denied, 346 U.S. 814; *N.L.R.B.* v. *Waterfront Employers*, 211 F. 2d 946, 953 (C.A. 9).

[35] Donald Freedberg (pp. 12-13, n. 21-22, *supra*) and Ashjarn Saelvik (p. 8, n. 13, *supra*).

[36] Osnes and Nicolaysen (pp. 8-9, *supra*).

the remaining List No. 2 men referred during this period,[37] the record contains no evidence about the circumstances surrounding their referral. In sum, there is no record evidence that the Company ever canceled its request for DiBoff, or that the Union believed it had. Indeed, the Company hired DiBoff as soon as he obtained a referral slip.[38]

The Board was also warranted in rejecting the contention that Powell refused to refer DiBoff because the Company's contractual quota of List No. 2 carpenters had been filled, and not because of his animus against DiBoff's protected activities. As we have shown on pp. 12-13, *supra*, the Union, in disregard of the contract, referred eight or nine List No. 2 men to the Company (some of whom it had not specifically requested by name) during the summer of 1963, when DiBoff was unsuccessfully seeking referral. The record contains no reasonable explanation for Powell's strict enforcement of the contract against DiBoff alone, other than Powell's resentment at DiBoff's exercise of his statutory rights.[39] Because

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[37] Wood, O'Shaughnessy, Wymer, Bert Harrington, and Jacob Morken (see n. 21, p. 12, *supra*).

[38] In any event, as the Board pointed out (R. 34), the Union's denial of the Company's original request, being unlawfully motivated, makes the Union responsible for all the consequences of its unlawful action even assuming that the Company's failure to renew the request amounted to a revocation. Cf. *N.L.R.B.* v. *Sunrise Lumber & Trim Corp.*, 241 F. 2d 620, 625, (C.A. 2), cert. denied, 355 U.S. 818; *N.L.R.B.* v. *Interurban Gas Co.*, 354 F. 2d 76, 77 (C.A. 6), enforcing 149 NLRB 567, 578.

[39] Although pointing out that at all material times the Company's ratio between List No. 2 men and List No. 1 men

Powell's refusal to refer DiBoff was motivated by improper considerations, it is, of course, immaterial that the contract might have justified Powell's action.[40]

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was at maximum or exceeded maximum, the Examiner surmised that this "could" have been caused by an erroneous calculation of the ratio by the Union, the laxity of the Union in adhering to the contract or the knowledge of the Union that more List No. 1 men would be employed in the near future and the ratio would thus be restored (R. 21-22). The Board was warranted in rejecting these speculations. Cf. *N.L.R.B.* v. *Sun Shipbuilding & Dry Docks Co.*, 135 F. 2d 15, 31 (C.A. 3).

[40] *Puerto Rico Drydock & Marine Terminals* v. *N.L.R.B.*, 284 F. 2d 212, 213-215 (C.A. D.C.), cert. denied, 364 U.S. 883; *N.L.R.B.* v. *Local 369, Electrical Workers*, 341 F. 2d 470 (C.A. 6); *Local 18, Operating Engineers* (*Earl D. Creager, Inc.*), 141 NLRB 512, enforced *per curiam*, March 23, 1965 (C.A. 6, No. 15907). See also, *Wells, Inc.* v. *N.L.R.B.*, 162 F. 2d 457, 459-460 (C.A. 9); *N.L.R.B.* v. *Dant*, 207 F. 2d 165, 167 (C.A. 9); *N.L.R.B.* v. *Texas Independent Oil Co.*, 232 F. 2d 447, 450 (C.A. 9).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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April 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation

of subsection (a) (3) or to discriminate against an employee with respect to whom membership, in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary

relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

Pursuant to Rule 18(f) of the Rules of the Court

GENERAL COUNSEL'S EXHIBITS [1]

No.	Identified	Offered	Received in Evidence	Rejected
1(a)-1(k)	4	4	4	—
2(a)-2(b)	10	10	11	—
3	18	19	19	—
4	20	21	23	—
5(a)-5(b)*	40	39	—	—
		145	151	—
6*	40	39	—	—
		159	160	—
7	42	44	46	—
8**	59	59	—	62
		270	—	271
9	69	68	69	—
10***	78	79	—	81
			84	—
11***	79	79	—	81
			84	—
12	84	83	84	—
13	84	83	84	—
14	191	192	192	—
15	258	255	261	—

[1] References are to the Reporter's stenographic transcript.

* General Counsel's Exhibits 5(a), 5(b), and 6 were originally offered, withdrawn and later reoffered and received.

** General Counsel's Exhibit 8 was twice offered and twice rejected by the Trial Examiner.

*** General Counsel's Exhibits 10 and 11 were originally rejected by the Trial Examiner who later changed his ruling of his own accord without a reoffer.

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